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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NORMAN F. SCHMITT, IN HIS OWN RIGHT AND AS AGENT AND REPRESENTATIVE OF R. W. BABB, JR., ET AL _____ *Petitioners*

v. No. _____

WAR EMERGENCY PIPELINES, INC., AND RECONSTRUCTION FINANCE CORPORATION *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

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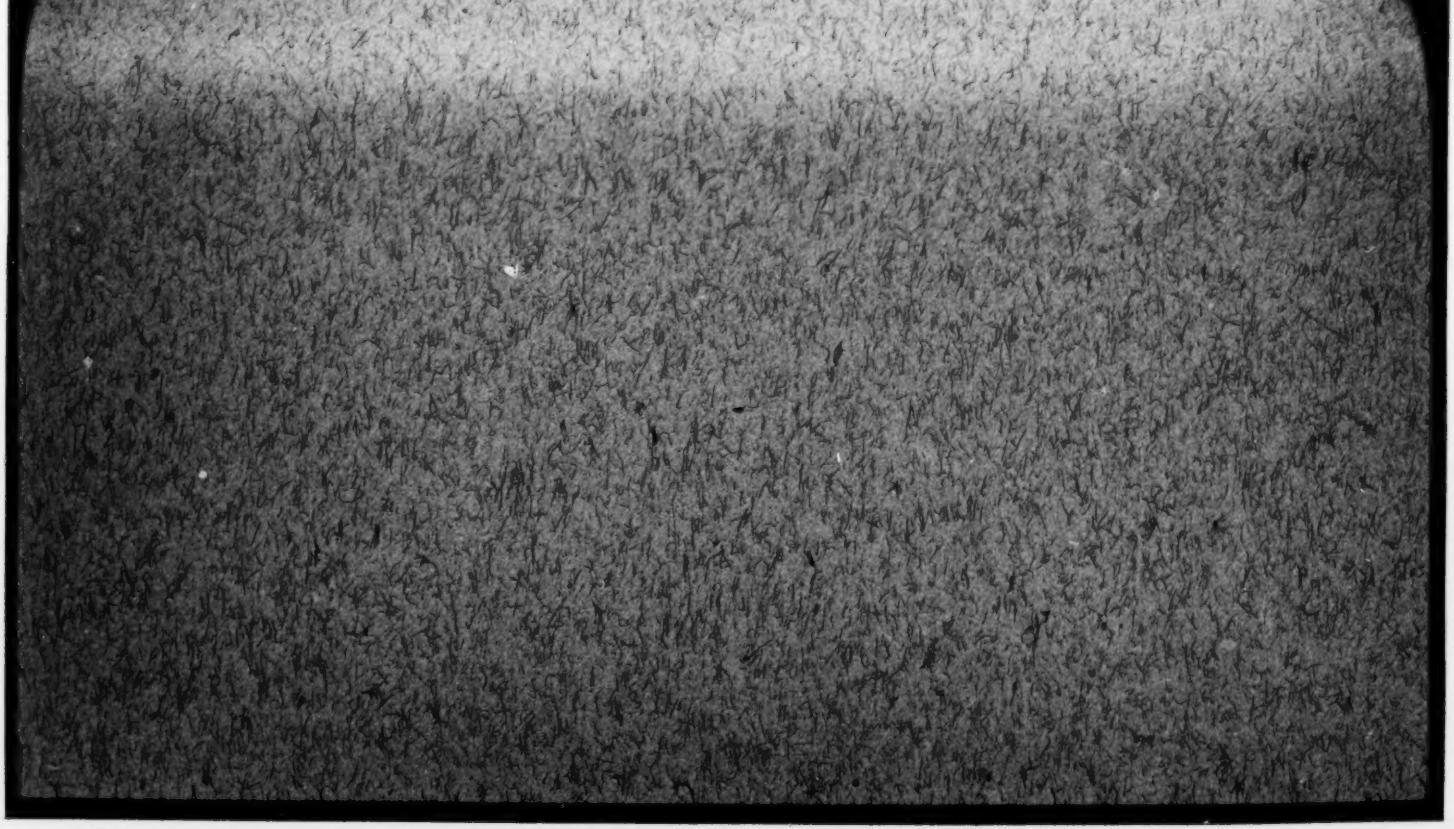
September 2, 1949



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NORMAN F. SCHMITT, IN HIS OWN RIGHT AND AS AGENT AND REPRESENTATIVE OF R. W. BAIRD, JR., ET AL ..... *Petitioners*

v. No. ——

WAR EMERGENCY PIPELINES, INC., AND RECONSTRUCTION FINANCE CORPORATION .. *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

Norman F. Schmitt, in his own right and as agent and representative of R. W. Baird, Jr. and the other 65 petitioners named in paragraphs 49 and 51 of the stipulation upon which this cause was submitted (R.54-57), pray the court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for

the Eighth Circuit in the above entitled cause (No. 13,774 in that court) which said judgment was rendered on June 22, 1949 (R.89), and, for cause, respectfully show:

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has not yet been reported. It will be found on pages 83-89 of the record.

JURISDICTION

The jurisdiction of this court is based upon 28 USCA, Section 1254, which is a revision of Section 240 of the Judicial Code (28 USCA, Section 347 (a)) and upon the cases and argument under "Reasons Relied on for Allowance of Writ". This petition for writ of certiorari is being filed within the time required by 28 USCA, Section 350.

QUESTIONS PRESENTED

The questions presented are:

1. Was War Emergency Pipelines, Inc., a "*pipeline Company*" within the meaning of the Interstate Commerce Act?

2. Even if War Emergency Pipelines, Inc., was a pipeline company, were those petitioners whose duties pertained only to the construction of the pipelines before oil was introduced into the lines upon which they worked engaged in the "carrier" or "transportation" activities of WEP so as to preclude them from the benefits of the Fair Labor Standards Act?

SUMMARY STATEMENT OF THE MATTER INVOLVED

For the purpose of providing adequate supplies of petroleum in the east during the recent war, the Government caused the "Big Inch" and "Little Big Inch" pipelines to be constructed from the Texas oil fields to the Atlantic seaboard (R.33-36). All the funds for their construction and operation were supplied, respectively, by Defense Plant Corporation and Defense Supplies Corporation—corporations which were organized by respondent, Reconstruction Finance Corporation, pursuant to Congressional authority (R.35). Ownership of the pipelines was in Defense Plant Corporation (R.38, 60, 62), while Defense Supplies Corporation operated them under lease (R.36, 65-69). Under formal agreements, War Emergency Pipelines, Inc. was engaged by Defense Plant Corporation and Defense Supplies Corporation, respectively, to construct and operate the pipelines (R.58-65; R.69-76). On June 30, 1945, Congress dissolved Defense Plant Corporation and Defense Supplies Corporation and transferred to Reconstruction Finance Corporation all their functions, assets and liabilities (Par.9, R.35).

Hereafter War Emergency Pipelines, Inc., Reconstruction Finance Corporation, Defense Plant Corporation and Defense Supplies Corporation will be referred to, respectively, as WEP, RFC, DPC and DSC.

All the petitioners were employed by WEP (R.38, 84). After the dissolution of DPC and DSC, petitioners brought this suit under the Fair Labor Standards Act against respondents, WEP and RFC, to recover overtime compensation, liquidated damages and attorney's fee (R. 1-6, 10). It was stipulated that, during their employ-

ment as time keepers and materialmen and chief time keepers and materialmen in the construction of the pipelines, *all 67 of the petitioners worked 12 hours a day, 7 days a week, and that none of them was paid overtime for any work* (Par.24, R.40); and the amounts, if any, which they are entitled to recover were likewise stipulated (Par.51, R.55-57).

Respondents concede that petitioners were entitled to recover unless they were exempted under Section 13 (b) (2) of the Fair Labor Standards Act (29 U.S.C.A., Sec. 213 (b) (2)), which is to the effect that the overtime provisions of that act shall not apply with respect to "any employee of an employer subject to the provisions of Sections 1-27 of Title 49"—the Interstate Commerce Act. The latter act applies to "common carriers engaged in * * * (b) the transportation of oil * * * by pipeline * * * (c) from one State * * * to any other State" (49 U.S.C.A., Section 1 (1)). Respondents admitted that WEP was not a common carrier for hire for the reason that it did not hold itself out to the public as being available for the transportation, for a consideration, of all oil offered, the proof being that WEP was a non-profit corporation (R.41, 84), and that the Petroleum Administration for War absolutely controlled the kind of petroleum which should be transported through these lines and designated the quantities thereof as well as the persons to whom the oil should be delivered (Par. 32, R.42). But respondents contended that WEP was amenable to the Interstate Commerce Act because it was a "pipeline company" within the meaning of that part of the act which declares that "the term 'common carrier' as used in this chapter shall include all pipeline companies * * *" (49 U.S.C.A., Section 1 (3)). Petitioners strongly denied that WEP was a pipeline company.

The principal issue, therefore, is: Was WEP a pipeline company within the meaning of the Interstate Commerce Act? The undisputed facts on this issue, as disclosed by the stipulation upon which the case was tried, were as follows: WEP was a private (Delaware) corporation (R.34). It was organized by eleven major oil companies to supply the "know how" for the construction and operation of the pipelines (R.34). Only $1,000.00 of its authorized capital stock was ever paid in, and none of it was ever used for any purpose (R.34). It had no other property (R.54). Specifically: WEP did not own or have any interest in the pipelines; DPC owned them (R.59, 60; Par. 3, R.66). WEP did not own or have any interest in the "line fill"; DSC owned it (Par. 3, R.66; Par.9 (b), R.75). WEP was in no sense autonomous. It could not employ petitioners or any one else without the approval of DPC or DSC (Par. 22 and 23, R.40). While it paid its employees with its checks, funds to pay them were supplied by DPC and DSC (Par. 29, R.41). The operation of the pipelines showed a profit of more than $180,000,000; but, since WEP was strictly a non-profit corporation (Par.28, R.41) and had no interest of any nature in the pipelines, none of these profits belonged to it (Par.35, R.42). All of the profits belonged to RFC, as successor to DPC and DSC, and WEP, which was in the process of winding up its affairs at the time of the trial, accounted to RFC for them (Par.48, R.54). On these facts, the court below held WEP to be a pipeline company. Petitioners believe that ruling is erroneous. This court has never decided whether a concern such as WEP was shown to have been is a "pipeline company". This is an important question of federal law which has not been, but should be, settled by this court.

There is another reason WEP is not amenable to the Interstate Commerce Act. This Act is for the purpose of protecting the public, dealing in commodities shipped in interstate commerce, and among other things, to regulate interstate rates of transportation. In the case now before the court, the Petroleum Administration for War fixed the kind, quantity and quality of petroleum products which were to be shipped in interstate commerce through these two pipe lines, and the time when said shipments were to be made. The Petroleum Administration for War had therefore done all in this case which the Interstate Commerce Commission could have done, and therefore any attempted regulation by the Interstate Commerce Commission would have been useless.

If, notwithstanding petitioner's contention, the court should hold that WEP was subject to the Interstate Commerce Act, petitioners concede that the five of their number who were employed as warehousemen in connection with the *actual operation* of the pipelines *after* oil was introduced into them (Par.18, R.38; Par.49, R.54) would be precluded from recovering because their duties pertained to carrier and transportation activities of WEP. But petitioners contend—and this is the other issue—that, as to all 67 of them who were employed to assist only in the *construction* of the pipelines *before* oil was introduced into the lines upon which they worked (Par.17, R.38; Par.51, R.55-57), recovery under the Fair Labor Standards Act could be had because their duties were not connected, directly or indirectly, with "carrier" or "transportation" activities of their employer. The court below held that petitioners engaged in construction were precluded from recovery, either because petitioners' distinction between carrier and non-carrier activities was not

well taken or because the construction work operated to increase the pipeline facilities. Petitioners believe that ruling is erroneous and in conflict with an opinion of the United States Court of Appeals for the Second Circuit and with opinions of certain district courts.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. This court has consistently held that the Fair Labor Standards Act is remedial; that its remedial provisions should be given a liberal construction in accordance with the purpose of Congress, which was to eliminate sub-standard labor conditions; and that the exemption provisions of the act should be strictly construed. In denying recovery to petitioners, the court below has gone counter to those well established rules and has deprived petitioners, who worked 12 hours a day, 7 days a week, of the benefit of the Fair Labor Standards Act, while respondents, for some reason which has never been explained, "in order to meet competition" paid overtime to other employees of WEP similarly situated in accordance with the act (Par.45, R.54).

2. This court has never decided whether a concern such as WEP was shown to have been is a "pipeline company" within the meaning of the Interstate Commerce Act. This is an important question of federal law which should be settled by this court.

3. It was not until the adoption of the Transportation Act of 1920 that Congress declared that all pipeline companies should be deemed to be common carriers. *Valvoline Oil Company* v. *United States,* 308 U. S. 141, 84 L. Ed. 151, 60 S. Ct. 160, and *Champlin Refining Company* v. *United States,* 329 U. S. 29, 91 L. Ed. 22, 67 S. Ct. 1, are

the only "pipeline" cases decided by this court since the adoption of that act. In each of those cases it was undisputed that the concern in question owned the pipeline and was *in fact* a pipeline company. Petitioners have consistently contended that, since WEP neither owned nor had any interest in the pipeline and since it was strictly a non-profit corporation, it was not a "pipeline company".

4. In the *Champlin* case, this court held that Congress' "use of the term 'common carrier' is to include all pipeline companies" and that this would be "a meaningless addition if it thereby included only what the term without more always had included" (329 U. S. 33, 67 S. Ct. 3). This may have meant,—and petitioners believe it did mean—that, if a concern was not, in fact a pipeline company in the sense that it owned its facilities and was in business for profit, it would not be covered by the act. If this is the proper construction of the language, the court below has decided a federal question in conflict with an applicable desicion of this court, and the writ should be granted.

5. Defining the term "transportation" in the Interstate Commerce Act (49 U.S.C.A., Section 1 (3)), Congress provided substantially that it should include all facilities of shipment "irrespective of ownership or of any contract, express or implied, for the use thereof". But Congress did not define a "pipeline company", and certainly did not provide that a concern could be a "pipeline company" if it neither owned its facilities nor existed for profit. The court below, in holding that WEP was a pipeline company, took the view that mere possession, control and operation of a pipeline was sufficient to constitute a concern as a "pipeline company", irrespective of its lack of ownership of facilities or of its non-profit

character. In doing so, the court below extended the statutory definition of the term "transportation" to the term "pipeline company". Petitioners believe this construction to be erroneous. This is an important question of federal law which has not been, but should be, settled by this court.

6. Insofar as the opinion of the court below denied to those 67 petitioners who were engaged wholly in non-carrier and non-transportation activities of their employer, WEP, the right to recover under the Fair Labor Standards Act, the opinion is in conflict with the opinion of the Court of Appeals for the Second Circuit in *Walling* v. *The Connecticut Company*, 154 F. (2d) 552, and with the opinions of district courts in *Jackson* v. *Northwest Airlines, Inc.*, 70 F. Supp. 500, *Nelson* v. *Agwilines, Inc.*, 70 F. Supp. 497, and *Roland* v. *United Airlines, Inc.*, 75 F. Supp. 25, even if it should be held that WEP was a pipeline company.

PRAYER FOR WRIT

Wherefore, petitioners pray that this court issue its writ of certiorari directed to the United States Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be named therein a full and complete transcript of all the record and of all the proceedings in the cause numbered on its docket as 13,774 and entitled "*Norman F. Schmitt, in his own Right and as Agent and Representative of R. W. Baird, Jr., et al, Appellants* v. *War Emergency Pipelines, Inc., and Reconstruction Finance Corporation, Appellees*", and that, upon a full hearing of said cause, the judgment of the said

United States Court of Appeals for the Eighth Circuit be reversed; and that petitioners may have such other and further relief in the premises as this court may deem proper.

Respectfully submitted

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September 2, 1949

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

WEP Was not a Pipeline Company within the Meaning of the Interstate Commerce Act

The court below cited *Valvoline Oil Company* v. *United States,* 308 U. S. 141, 84 L. Ed. 151, 60 S. Ct. 160, and *Champlin Refining Company* v. *United States,* 329 U. S. 29, 91 L. Ed. 22, 67 S. Ct. 1, as authorities for the holding that all "pipeline companies" engaged in the interstate transportation of oil by pipeline are subject to the Interstate Commerce Act "even though they merely transport their own products for commercial use". This is a correct statement of what these cases held; but it is of no assistance in the solution of the question whether WEP was a "pipeline company" for the reason that it was conceded that the concerns there under consideration owned the pipelines and were "pipeline companies", while petitioners have consistently contended that WEP is not such a company. For example, in the *Valvoline* case this court said (308 U. S. 144, 60 S. Ct. 162):

> "There is no controversy over whether appellant is an interstate pipeline company. Obviously it is."

Likewise, in the *Champlin* case it was said (329 U.S. 33, 67 S. Ct. 2):

> "Champlin owns and operates a line of six-inch pipe 516 miles in length, lying in five states."

So we must search deeper to see whether this court in those cases said anything to indicate how it would regard a company that did not own and had no interest in its own facilities and was not in business for the purpose of making a profit; or, to put it more precisely, whether this court would regard such a company as a "pipeline company".

Prior to 1920, any concern, whether owner, lessee or operator, which was engaged in transporting oil in interstate commerce *as a common carrier for hire* was subject to the Interstate Commerce Act. *The Pipeline Cases,* 234 U. S. 546, 58 L. Ed. 1459, 34 S. Ct. 956. But prior to that time no company—not even one which owned the pipeline, was in business for profit and was, by common consent, a "pipeline company"—was subject to the Interstate Commerce Act unless it was a common carrier for hire: that is, unless it held itself out to the public as being available for transportation, for a consideration, of all oil offered. Then came the Transportation Act of 1920. Then for the first time Congress declared, in effect, that all "pipeline companies" should be deemed to be common carriers, whether they were such under the common law concept of that term. But Congress did *not* declare that a concern should be deemed to be a pipeline company unless it was such a company *in fact.*

The question naturally arises: Why did Congress, in the Transportation Act of 1920, provide that all "pipeline companies" should be deemed to be common carriers, even though they did not possess the common law attributes required of common carriers? It was not necessary for Congress so to provide if it merely intended to make amenable to the act common carriers which were

lessees or operators of interstate pipelines, this for the reason that they were already subject to it. *The Pipeline Cases, supra.* This court will not construe the new expression "all pipeline companies" in such a way as to make it cover only those concerns which were already subject to the act and thereby to give no meaning to the new expression. To do so would violate a familiar rule of statutory construction, which is that courts will undertake to give meaning to every enactment of the legislative body. As said by this court in the *Champlin* case (329 U. S. 33, 67 S. Ct. 3):

> "Admittedly Champlin is not a common carrier in the sense of the common law carrier for hire. However, the Act does not stop at this but goes on to say that its use of the term 'common carrier' is to include all pipe line companies—*a meaningless addition if it thereby included only what the term without more always had included* * * *"

In holding that the use of the term "common carrier" to include all pipeline companies would be meaningless if Congress thereby intended to include only what the term without more had always included, this court held in effect that the new expression "all pipeline companies" had a meaning and that it was incumbent upon the court to inquire into the nature of a concern when its status as a pipeline company was challenged. This view had been previously expressed in the *Valvoline* case, where the court remarked that there was "no controversy over whether appellant is an interstate pipeline company" (308 U. S. 144, 60 S. Ct. 162), thus clearly implying that if, as in the case now before the court, a concern's alleged status as a pipeline company should be drawn in question,

it would be the duty of the court to explore the facts and decide the question.

No where in the act did Congress define the term "pipeline company." No where did Congress expressly declare that ownership of the pipeline or the profit-making element should be of no importance in determining whether a given concern was a "pipeline company"; and it is impossible to spell out any intendent to this effect. Absent a definition of a pipeline company, it therefore devolves upon the court to inquire into the nature of WEP and declare whether it is, *in fact,* a pipeline company. If it develops that it is, *in fact, not* such a company, then it is not amenable to the Interstate Commerce Act.

When WEP is placed in the crucible for the purpose of determining whether it was a "pipeline company", the irresistible conclusion is that it was not. Its organization and structure were outlined in the "Summary Statement of the Matter Involved". All the facts in connection therewith are wholly inconsistent with the view that WEP was a "pipeline company". There is not a single circumstance in connection with the organization of WEP or the manner in which it functioned that is consistent with the theory that it was a "pipeline company." Everything about it shows that it was nothing but an empty shell. To hold that such a concern was a "pipeline company" and thereby to defeat the claims of these petitioners is to ascribe to WEP a status which all of the facts show it did not have and never was intended to have.

The precise question with which the court was confronted in the *Valvoline* and *Champlin* case was: Could the Interstate Commerce Commission compel Valvoline and

Champlin to file with the commission maps, charts and schedules of *their pipeline properties* for use by the Commission in valuing the properties? As the *owners* of the pipelines, Valvoline and Champlin, of course, had possession of all maps, charts and schedules of its pipeline properties. It was admitted that they were pipeline companies. *The only question in those cases was whether Valvoline and Champlin were engaged in transportation.* This court held that they were, and required them to turn over their maps, charts and schedules to the Interstate Commerce Commission.

If the commission had called upon WEP, petitioners' employer, to turn over to it the maps, charts and schedules for valuation of the pipelines, it would have been impossible for WEP to comply for the reason that *it had no pipeline properties.* In fact, it is stipulated that, prior to December 31, 1942, WEP had furnished to DPC without cost all engineering plans, specifications and surveys relating to the pipelines which were owned by DPC, made by or in the possession or control of WEP promptly as provided for in the contract between DPC and WEP (Par.44, R.54). This was done pursuant to an appropriate requirement in the construction agreement between DPC and WEP (R.59, 60). This illustration brings into the open the untenable claim of respondents that WEP was a "pipeline company". This court should not hold that a concern which has stripped itself of the maps, charts and schedules of properties which it does not own and which it merely operates without a fee is a "pipeline company" (Par.28, R.41).

The reason assigned by the court below for holding that WEP was a "pipeline company" should be considered. Answering petitioners' contention that WEP

could not be regarded as a pipeline company because "it neither owned nor held any interest" in the pipelines, the court observed that "it had possession and control of the pipelines, and it operated them", and added (R.86):

> "We think it indisputable, under 49 U.S.C.A. Section 1 (3), that anyone who controls a pipeline, whether through ownership, by lease, or on any other possessory basis, and operates it as a facility for the interstate transporting of oil is a pipeline company for the purposes of Part I of the Interstate Commerce Act."

We think the Court of Appeals was in error in holding that WEP was in possession or control of "a pipe line" or that in reality it was the operator of a pipe line. As shown in the "Summary Statement of the Matter Involved", WEP had no control whatsoever over the pipe line. It was owned by DPC and was leased by DSC, which was the operator and which was in sole and complete control of the operation of the pipe line. WEP could in no manner control the pipe line or the operation of it except under direct orders from DSC. WEP could not transport any oil through this pipe line except upon express authority and orders of DSC.

The reference (49 U.S.C.A. Section 1 (3)) is to the statutory definition of *transportation.* The quotation from the opinion shows unmistakably that the court below considered that the question whether a given concern was a "pipeline company" was to be determined by ascertaining whether that concern came within the statutory definition of "transportation", which term was defined to include "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof" (49 U.S.C.A.

Sec. 1 (3)). Petitioners submit that there is no basis for thus extending the definition of the term "transportation" to include the term "pipeline companies". It is proper to hold that a concern may be engaged in "transportation", even though it does not own its facilities and is not a "pipeline company", this for the reason that the definition of "transportation" compels this view. But there is no statutory definition of the term "pipeline company". There is no warrant for reading into the term "pipeline company" a definition which Congress applied only to the term "transportation".

In reply to petitioners' contention that WEP was not a "pipeline company", the court below said (R.87):

> "The argument made by appellants in the present situation has in effect been urged as to other forms of carriers and has been rejected,"

and referred to *Powell* v. *United States,* 300 U. S. 276, 57 S. Ct. 470, 81 L. Ed. 643. Petitioners are not aware of any case in which this court has decided whether a given concern was a "pipeline company", a railroad company or other form of carrier. In the *Powell* case, the reason for the decision that the concern there involved was subject to the Interstate Commerce Commission was that it was a *common carrier for hire.* Respondents do not even contend that WEP was a common carrier for hire. The *Powell* case is clearly not in point.

Ellis v. *Interstate Commerce Commission,* 237 U. S. 434, 59 L. Ed. 1036, 35 S. Ct. 645, was cited by the court below in connection with its observation that "here, as with any other carrier subject to that part of the Act, the criterion is control and use of facilities and not simply ownership" (R.87). The only relevance which the *Ellis*

case has to the instant action is that it shows how critically this court scrutinizes a given concern to ascertain whether it falls within the coverage of the Interstate Commerce Act. In that case, the Armour Car Lines was a corporation that owned refrigerator cars and leased them to railroads or to shippers. The question was whether this concern was a common carrier and thereby subject to the Interstate Commerce Act. The proof showed that Armour Car Lines did not furnish motive power for the cars, for which reason this court held that it was *not a common carrier.* The court said (234 U. S. 443):

> "It is true that the definition of *transportation* in Section I of the Act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, *not that the owners and builders shall be regarded as carriers, contrary to the truth*" (Italics supplied).

Thus this court refused to extend to the term "common carrier" the statutory definition of "transportation", which omits ownership as a factor, just as petitioners are contending that this court should not extend to the term "pipeline company" the statutory definition of "transportation." This court held that the fact that the Armour Car Lines owned and built the cars in question did not make it a common carrier unless it was such a carrier *in fact;* and it held that it was not a common carrier *in fact.* As in the *Ellis case,* when this court held that Armour Car Lines was not *in fact* a common carrier, so in the case at bar this court should require respondents to show that WEP was a pipeline company *in fact,* and should not hold that it was such a company "contrary to the truth."

The proof is overwhelming that WEP falls far short of qualifying as a pipeline company.

Although it cost some $165,000,000.00 to construct these pipelines and oil began to flow through one of them as early as December 31, 1942, the record shows that as late as July 11, 1946, when WEP was engaged in winding up its affairs, the commission had never "issued any order relating to these pipelines" (R.53). Knowing the eagerness with which supervisory bodies customarily seek to reach out and regulate the activities of concerns thought to be under their jurisdiction, it is more than passing strange that the Interstate Commerce Commission never even sought to regulate WEP. If WEP had been subject to the Interstate Commerce Act, it goes without saying that it would have undertaken to regulate it. The fact that it did not do so is a cogent reason for concluding that the commission recognized that it had no right to do so because WEP was not a "pipeline company."

II

Even if WEP Was a Pipeline Company, the 67 Petitioners Whose Duties Pertained Only to the Construction of the Pipelines Before Oil Was Introduced into the Lines upon which They Worked Were not Engaged in the "Carrier" or "Transportation" Activities of WEP so as to Preclude Them from the Benefits of the Fair Labor Standards Act.

All 67 of the petitioners were employed to assist in the *construction* of the pipelines *before* oil was introduced into the lines upon which they worked (Par.17, R.38; Par. 51, R.55-57). *After* oil was introduced into the pipelines, five of the same 67 petitioners were employed as ware-

housemen to assist in the handling, checking, inspecting and receiving of interstate shipments in connection with the *actual operation* of the pipelines (Par.18, R.38; Par. 49, R.54). These five concede that, if WEP is a pipeline company, they are precluded from recovering under the Fair Labor Standards Act for the reason that their duties concerned the "carrier" and "transportation" activities of WEP. But, as to the 67 petitioners whose duties pertained only to the construction of the pipelines *before* oil was introduced into the lines upon which they worked, petitioners contend that they are protected by the Fair Labor Standards Act *even though WEP is a pipeline company.*

This distinction was drawn by the United States Court of Appeals for the Second Circuit in *Walling* v. *The Connecticut Company,* 2 Cir., 154 F. (2d) 552. There the court had under consideration Section 13 (a) (9) of the Fair Labor Standards Act which exempts "*any employee*" of a local trolley carrier from the provisions of the Act. The plaintiffs were employees in the power house of the trolley carrier. The defendant trolley carrier contended that they were exempted from the provisions of the Fair Labor Standards Act by reason of the section of the act above referred to. But the court held otherwise, saying (154 F. (2d) 553):

> "Defendant's contention comes to this: Since it is a 'local trolley carrier', none of its employees is covered by the Act because Sec. 13 (a) (9) expressly exempts 'any employee' of such a carrier. Literally, that contention is correct. But it would mean that, no matter in what business, however extraneous to its functioning as a 'local trolley carrier', defendant engaged, those employed in that extraneous business would be exempt. The policy

> of the Act, disclosed in its history, precludes the acceptance of such a literal construction."

The court there took a broad view of Section 13 (a) (9), which is comparable to Section 13 (b) (2) in that both of them purport to exempt "*any employee*" of the carrier. It was held that a literal construction of this provision should not be given since this would result in the exemption of employees whose duties were wholly extraneous to its "carrier" activities, contrary to the purpose of Congress.

The same distinction was made in *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501. There, the plaintiffs were engaged in "modification" work on army airplanes at the manufacturing plant of the defendant which was "a carrier by air". This work pertained only to the non-carrier activities of the defendant. Section 13 (a) (4) of the Fair Labor Standards Act exempted from the provisions of Section 6 and 7 thereof "*any employee* of a carrier by air subject to the provisions" of certain sections of the Railway Labor Act. The defendant's position was that it was subject to the Railway Labor Act with respect to *some* of its activities and that *all* of its employees were, therefore, exempted from the provisions of the Fair Labor Standards Act even though their duties pertained to non-carrier or non-transportation activities of their employer. But the court held otherwise, saying that "the Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities", adding: "It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the work included carrier activities within its company functions" (70 F. Supp. 513).

This is precisely the situation presented in the case at bar as to all 67 petitioners who worked only in connection with the construction of the pipelines before oil was introduced into the lines upon which they worked. Their duties pertained only to the non-carrier activities of WEP. It is not until the pipelines were completed and oil was transported through them that the activities of any of the petitioners were concerned with the "carrier" or "transportation" activities of WEP. Only the five warehousemen (Par.49, R.54) were employed after oil was introduced into the ippelines. Under the doctrine of the *Walling* and the *Jackson* cases they are the only plaintiffs who are precluded from recovery, even if WEP is held to be a pipeline company.

The decisions in *Nelson* v. *Agwilines, Inc.*, 70 F. Supp. 497, and *Roland* v. *United Airlines Inc.*, 75 F. Supp. 25, are to the same effect as those in the *Walling* and *Jackson* cases. At the time of the preparation of this petition and brief, the *Jackson* case had been argued and submitted to the United States Court of Appeals for the Eighth Circuit but had not been decided.

The court below rejected the distinction which petitioners undertook to draw between those of their number who were engaged in construction only and those who were engaged in the actual operation of the pipelines, saying (R.88):

> "All the construction work thus merely went to increase the pipeline facilities, and in relation to Emergency Pipelines' intended and actual operation of them served only to enlarge the scope of the latter's carrier activity."

This is true; but the work of those 67 petitioners whose duties pertained only to the construction of the

pipelines *before* oil was introduced into them bore nothing more than a "tenuous, negligible and remote relation" to the transportation activities of the defendant. The situation is not unlike that presented in a line of cases under the Federal Employers Liability Act typified by *Raymond* v. *Chicago, Milwaukee & St. Paul Railway Company*, 243 U. S. 43, 61 L. Ed. 583, 37 S. Ct. 268. There the railroad employed the plaintiff as a laborer in a tunnel which had been only partially bored when the plaintiff was injured. The question was whether the plaintiff and the railway were engaged in interstate commerce. This court unanimously held that they were not so engaged for the reason that, at the time of the injury complained of, the tunnel was "not in use as an instrumentality of interstate commerce" (243 U. S. 44). By the same token, the pipelines were only being constructed and were not in use when the 67 petitioners performed their work; so that they, too, were employed solely in connection with the non-carrier activities of WEP.

The only case referred to by the court below in support of its holding that WEP's employees, who were engaged in construction only *before* the lines on which they worked were put into the channels of interstate commerce by the introduction of oil into them, were exempted because they were engaged in extending its lines "or otherwise augmenting or improving its carrier facilities" was *McComb* v. *Union Stock Yards & Transit Company*, 7 Cir., 168 F. (2d) 375 (R.88). There, the employees in question were not hired for the purpose of constructing facilities which were *later* to be used in interstate commerce. They were employed to guard the defendant's loading and unloading facilities which were *already* in interstate commerce. The position of the watchmen there was, therefore,

wholly unlike that of the 67 petitioners whose duties pertained only to construction of the pipelines *before oil* was introduced into them.

CONCLUSION

In the absence of the amendment wrought by the Transportation Act of 1920, there would be no possible way to defeat petitioners' claims, this for the reason that even respondents do not contend that WEP was a common carrier. The only change which that act made, in so far as the issue here is concerned, was to provide that "all pipeline companies" engaged in the interstate transportation of oil should be amenable to the act even though they were not common carriers. WEP was not such a company and therefore was not subject to the act—a fact recognized by the Interstate Commerce Commission, which never undertook to regulate it. It follows that petitioners were not exempt and that they are entitiled to recover.

The effect of the decision below is to deprive petitioners, who worked 84 hours a week, of the benefits of the Fair Labor Standards Act, while their fellow employees doing similar work were being paid overtime under that act. To correct that result and to settle the several questions of federal law involved. this petition should be granted and the judgment should be reversed.

Respectfully submitted

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September 2, 1949

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NORMAN F. SCHMITT, IN HIS OWN RIGHT AND AS AGENT AND REPRESENTATIVE OF R. W. BAIRD, JR., ET AL. ..... *Petitioners*

v. No. 321

WAR EMERGENCY PIPELINES, INC., AND RECONSTRUCTION FINANCE CORPORATION ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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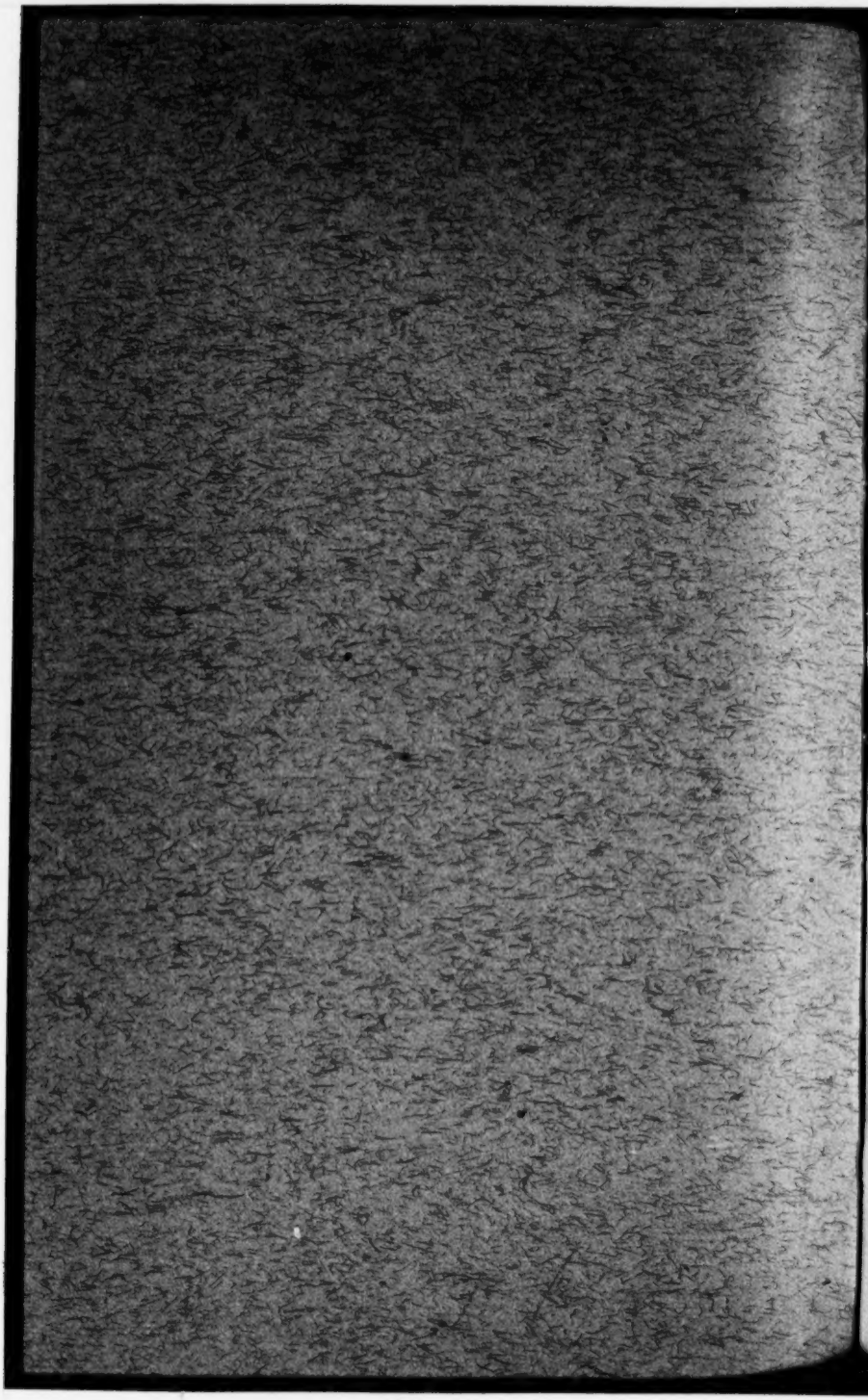

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

WEP Was Not a Pipeline Company Within the Meaning of the Interstate Commerce Act

It is undisputed that WEP was not a common carrier. Unless it was a "*pipeline company*" within the meaning of the Interstate Commerce Act, it was not amenable to that Act, and petitioners are entitled to recover.

Respondents have not answered petitioners' argument that, in the absence of a statutory definition of the term "pipeline company", it devolves upon the courts to probe the concern in question and ascertain whether it was, *in fact*, a pipeline company. They have advanced no argument in opposition to petitioners' contention that an empty shell of a concern such as WEP, which owned nothing and did not even exist for profit, should not be held to be a pipeline company.

Instead, respondents have fallen back upon the definition of "transportation" (p.6) in an effort to show that WEP was a "pipeline company." But the two terms are not interchangeable and are not to be confused. In order for a given pipeline concern, which is not a common carrier, to be subject to the Interstate Commerce Act, it must have two attributes: (1) It must be, *in fact*, a "pipeline company" and (2) it must be engaged in the interstate transportation of oil by pipeline. A concern may very well be engaged in "transportation" without being, in fact, a pipeline company.

In our original brief (pp. 17-18), we pointed out that this Court, in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, refused to extend to the term "common carrier" the statutory definition of "transportation". It held that the owners and builders of refrigerator cars which had been leased to railroads or to shippers must, in order to be subject to the jurisdiction of the Interstate Commerce Commission, be common carriers *in fact*, and that they could not be "regarded as carriers, contrary to the truth" (237 U. S. 443). Petitioners urge that the *Ellis* decision is controlling here, that the question whether WEP was a pipeline company depends

upon whether it was such a company *in fact*, and that it cannot be regarded as such a company "*contrary to the truth*".

Respondents rely upon *United States* v. *Baltimore & Ohio Railroad Company*, 333 U. S. 169, 176 (p. 6). There, the question was whether the Interstate Commerce Commission had authority to prohibit the Baltimore & Ohio and other railroads from refusing to deliver interstate shipments of livestock to sidetracks which the railroads used but did not own. In holding that the Commission was so authorized, this Court pointed out that the Act makes "all trackage '*in use by any common carrier*' subject to the regulatory provisions of the Act, *even though not owned by the carrier, but only used by it under a contract or agreement*" (Italics supplied). Clearly that decision was bottomed upon the fact that the Act, by its very terms, subjected the trackage "*in use by any common carrier*" to the regulatory provisions of the Act, regardless of the question of ownership. That case has no bearing on the issue now before the Court. Here WEP was *not* a common carrier; and the Interstate Commerce Act nowhere provides that ownership of facilities shall be of no consequence in determining whether a concern is a "pipeline company" or that it is sufficient, for the purposes of determining whether a concern is amenable to the Act, that a concern merely *uses* a pipeline.

CONCLUSION

The question is whether WEP was a pipeline company, not whether it was engaged in transportation. The statutory definition of transportation is no guide in determining whether WEP was a pipeline company. Unless it was such a company *in fact*, it was not subject to the Interstate Commerce Act. All the facts surrounding its organization and the manner in which it functioned, together with the significant circumstance that the Interstate Commerce Commission never sought to regulate any of its activities, show that it was not a pipeline company and that it was, therefore, not subject to the Act.

Since WEP was not subject to the Act, petitioners, who were its employees, are not exempted from the Fair Labor Standards Act. The petition should, therefore, be granted and the judgment should be reversed.

Respectfully submitted,

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October 19, 1949

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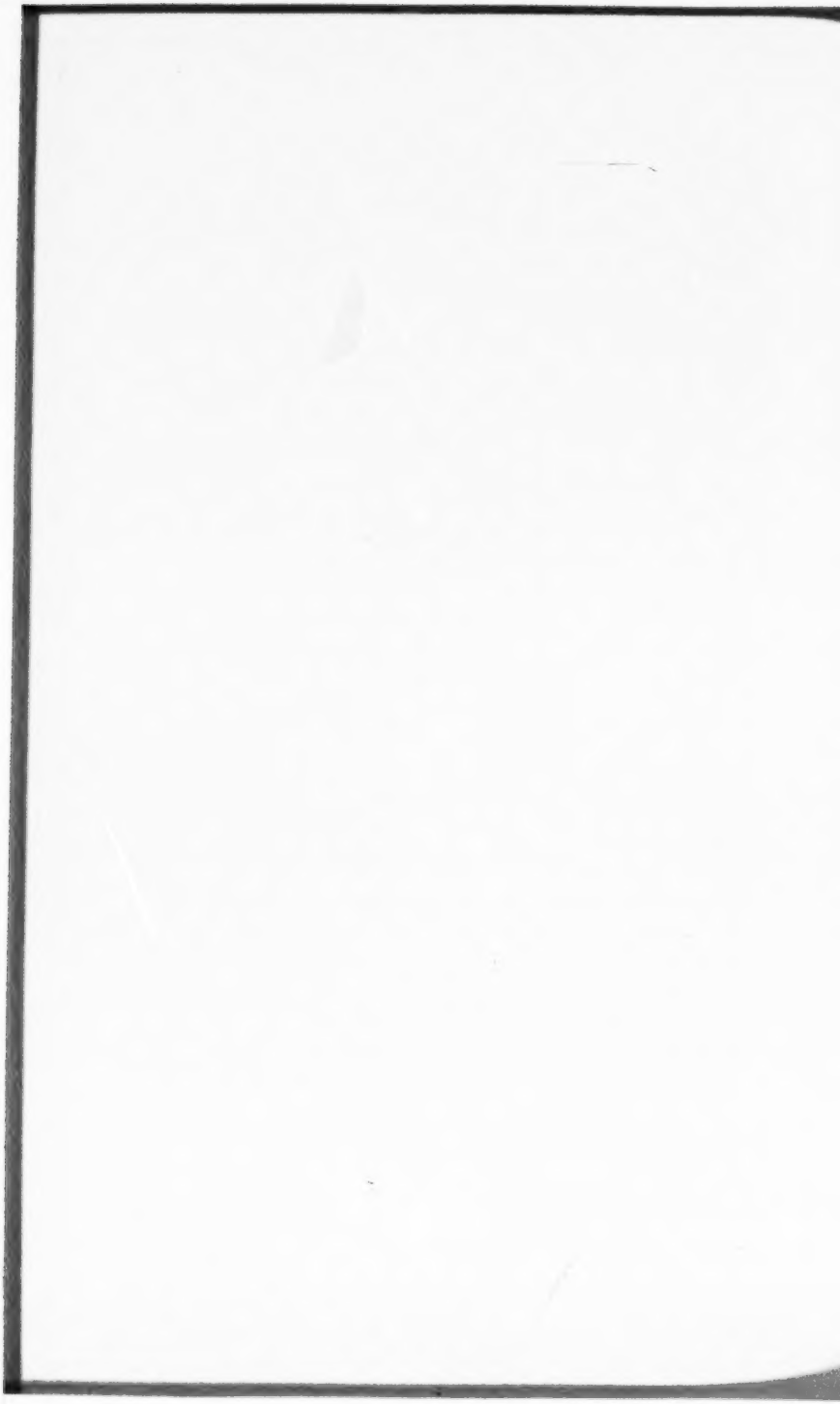

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 321

NORMAN F. SCHMITT, IN HIS OWN RIGHT AND AS AGENT AND REPRESENTATIVE OF R. W. BAIRD, JR., ET AL., PETITIONERS

v.

WAR EMERGENCY PIPELINES, INC., AND RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas (R. 18-25) is reported at 72 F. Supp. 156. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 83-89) is reported at 175 F. 2d 335.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1949 (R. 89). The petition for a writ of certiorari was filed on September 9, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether War Emergency Pipelines, Inc., which constructed and operated the "Big Inch" and "Little Big Inch" pipelines for Defense Plant Corporation and Defense Supplies Corporation during World War II, was a common carrier subject to Part I of the Interstate Commerce Act and therefore exempt from the overtime provisions of the Fair Labor Standards Act by reason of Section 13(b)(2) thereof which excludes "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

2. Whether, assuming that "any employee" is not to be construed literally so as to extend the exemption to activities wholly extraneous to carrier functions, petitioners, who were employed in the construction of "Little Big Inch" and the extenson of the "Big Inch" after War Emergency Pipelines had begun operation of the "Big Inch" in interstate oil transportation, were engaged in the carrier activities of War Emergency Pipelines.

STATUTES INVOLVED

Section 13 of the Fair Labor Standards Act, 52 Stat. 1067, 29 U. S. C. 213, provides in pertinent part as follows:

> (b) The provisions of section 7 shall not apply with respect to * * * (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

Section 1 of the Interstate Commerce Act, as amended, 49 U. S. C. 1, provides in pertinent part as follows:

> (1) That the provisions of this part shall apply to common carriers engaged in—. * * *
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;
>
> * * * * * * * *
>
> (3) (a) The term "common carrier" as used in this part shall include all pipeline companies; * * *. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *.

STATEMENT

At the outbreak of World War II, the existing means of transporting petroleum to the Atlantic seaboard were found to be inadequate by the Office of Petroleum Coordinator for War. The construction of two pipelines—"Big Inch" and "Little Big Inch" was recommended (R. 33-34, 35-36). Since the Government lacked qualified personnel, respondent War Emergency Pipelines, Inc. (WEP), a Delaware corporation, was organized by eleven

major oil companies to construct and operate the proposed pipelines without fee or profit to itself (R. 34).

In 1942 and 1943, contracts were entered into between WEP and Defense Plant Corporation (DPC) and Defense Supplies Corporation (DSC) —government corporations created by Reconstruction Finance Corporation (RFC) pursuant to 54 Stat. 572, 15 U. S. C. 606b—whereby WEP undertook to construct, manage, and operate the pipelines (R. 35-36; Ex. A, R. 58; Ex. C, R. 69). The terms of the agreements provided *inter alia* that WEP would act for DPC and DSC as agent, that WEP would be indemnified against liability, and that title to all land and facilities would be vested in DPC and DSC. The contracts were faithfully performed by the parties thereto (R. 38).

On July 1, 1945, by joint resolution of Congress, DPC and DSC were dissolved and their assets and liabilities transferred to RFC (R. 35). On January 31, 1946, WEP relinquished operation and control of the pipelines to RFC (R. 85).

This action is brought to recover overtime compensation, liquidated damages and attorneys fees, under Section 16(b) of the Fair Labor Standards Act, 29 U. S. C. 216(b). Petitioners were employed by WEP as time and material men to check, inspect and receive interstate shipments of materials and supplies used in the construction of the pipelines (R. 38). The services here involved were all performed subsequent to the date on which WEP

began using the "Big Inch" in interstate oil transportation. Part of the construction work consisted in the extension of the "Big Inch" beyond its original terminus to the East Coast; the rest went into the building of the auxiliary "Little Big Inch" (R. 88).

The District Court held that WEP is a common carrier subject to Part I of the Interstate Commerce Act and that its employees are, therefore, exempt from Section 7 of the Fair Labor Standards Act by reason of Section 13(b)(2) thereof, which excludes "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act." Judgment was entered for respondents. On appeal, the Court of Appeals affirmed; it concurred in the decision of the District Court that the pipeline operations of WEP are exempt from Section 7 of the Fair Labor Standards Act and further held that petitioners were engaged in the exempt carrier activities of WEP.

ARGUMENT

1. Section 13(b)(2) of the Fair Labor Standards Act, *supra*, p. 2, exempts from the provisions of Section 7 "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

Petitioner does not seem to deny that oil pipeline companies are common carriers under the Interstate Commerce Act, or that WEP is engaged in the transportation of oil within the meaning of

that statute. But petitioner contends that WEP is not a "pipeline company" because it does not own the pipeline facilities or make a profit.

The statutory language is clear, however, and it contains no exceptions such as are urged by petitioner. Section 1(1) of the Interstate Commerce Act provides that the Act "shall apply to common carriers engaged in * * * the transportation of oil * * * by pipe line." Section 1(3) not only declares that "the term 'common carrier' as used in this part shall include all pipeline companies,"[1] but defines "transportation" as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership* or of any contract, expressed or implied, for the use thereof." The inclusion of the phrase "irrespective of ownership" in the statutory definition of transportation demonstrates clearly that coverage under the statute does not depend upon ownership. *United States* v. *B. & O. R. Co.*, 333 U. S. 169, 176. We submit that the factor of ownership is as irrelevant to the question of whether a company is a "pipe-line company" within the Act as it is to the question of "transportation." Surely Congress did not intend that a company which operates an interstate pipeline system be excluded from the scope of the Act because it does not own the pipelines it operates. Nor does the statute contain any

[1] See *Valvoline Oil Co.* v. *United States*, 308 U.S. 141, and *Champlin Refining Co.* v. *United States*, 329 U.S. 29.

exemption for companies which have agreed not to make a profit. Since the law contains none of the exceptions which petitioner seeks to read into it, WEP unquestionably is an employer subject to Part I of the Interstate Commerce Act, and petitioner's arguments as to the status of the company are baseless.[2]

2(a). Assuming *arguendo* that the words in Section 13 of the Fair Labor Standards Act—"*any employee* of an employer subject to the provisions of Part I of the Interstate Commerce Act"—should not be construed so as to extend the exemption to any activity by a carrier which is wholly extraneous to its carrier functions, we submit that, on the facts of this case, the court below properly held that petitioners were employed in the carrier activities of WEP and exempt from the benefits of the Fair Labor Standards Act.[3]

Crude oil was first introduced into and transported interstate through the "Big Inch" on December 31, 1942 (R. 41). After that date, petitioners were employed as time and material men to check, inspect and receive interstate shipments of materials and supplies used in the construction of

---

[2] An alternative reading of the petition is possible, namely, that the pipelines were, in substance, directly operated by the United States (Pet. 5-6). But petitioners cannot be understood to be pressing this position, which would automatically exclude them from the benefits of the Fair Labor Standards Act. Section 3(d) of the Act exempts "* * * the United States or any State or political subdivision of a State, * * *."

[3] Since the decision below concedes that the term "any employee" should not be read literally, it does not conflict with the cases cited by petitioners (Pet. 19-22).

the auxiliary "Little Big Inch" and the extension of the "Big Inch" beyond its original terminus (R. 88). Although petitioners emphasize that their duties pertained only to the construction of the extension of the "Big Inch" and the construction of the "Little Big Inch" *before* oil was introduced into them, such work was performed *after* WEP had begun operation of the "Big Inch" and thus acquired the status of a common carrier under Section 1 of the Interstate Commerce Act.

The work upon which petitioners were engaged, the extension of existing pipelines in use, was clearly not wholly extraneous to WEP's operations as a pipeline company, the "wholly extraneous" test being crucial in the determination of coverage *vel non.* As the court below pointed out, "All the construction work thus merely went to increase the pipeline facilities, and in relation to Emergency Pipelines' intended and actual operation of them served only to enlarge the scope of the latter's carrier activity. * * * In sound practical aspect, therefore, the employees of Emergency Pipelines engaged in the construction work involved were in the same position and relationship as the employees of a railroad, for example, who are engaged in extending its lines, adding to its tracks, or otherwise augmenting or improving its carrier facilities" (R. 88). Cf. *McComb* v. *Union Stock Yards & Transit Co.,* 168 F. 2d 375 (C. A. 7); *McComb* v. *McKay,* 164 F. 2d 40 (C. A. 8); *Keele* v. *Union Pac. R. Co.,* 78 F. Supp. 678 (S. D. Calif.);

and see also *Virginian Ry.* v. *Federation,* 300 U. S. 515, 556-557.[4]

(b). Finally, the question is not one of general importance. Whether these particular employees were engaged in activities which were "tenuously and negligibly related" (Pet. 23) to the carrier activities of an employer subject to Part I of the Interstate Commerce Act is basically a factual issue of limited applicability. It is questionable whether a decision by this Court would necessarily be applicable in future litigation involving other carriers and other employees under different operative employment facts. The situation herein is a unique one which arose under peculiar wartime condi-

[4] The cases relied upon by petitioners are not at all apposite. In *Jackson* v. *Northwest Airlines,* 70 F. Supp. 501 (D. Minn.), and *Roland* v. *United Airlines,* 75 F. Supp. 25 (N. D. Ill.) the work involved was the modification of army planes by commercial airlines for the Government during wartime, which work had no effect upon the commercial activities of the airlines. The question raised in *Walling* v. *Connecticut Co.,* 62 F. Supp. 733 (D. Conn.), affirmed, 154 F. 2d 552 (C. A. 2) was whether powerhouse employees of a local trolley carrier, who would be exempt from the Fair Labor Standards Act under Section 13 (a) (9) if engaged in producing electricity solely for trolley operation, are not exempt if a substantial part of the power produced is sold to other users. Cases arising under the Federal Employers' Liability Act prior to its amendment in 1939 (53 Stat. 1404, 45 U. S. C. 51) such as *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 243 U. S. 43 (Pet. 23), are irrelevant. Prior to that amendment an injured employee could recover only if directly engaged in interstate commerce; the act now applies to employees whose duties are the "furtherance of interstate * * * commerce" or which "directly or closely and substantially, affect such commerce." (45 U. S. C. 51). The question raised herein is not whether the employees' work is directly in commerce but, as we have stated above, whether it is wholly extraneous to the carrier activities of the employer.

tions. Petitioners have made no showing that the outcome of this litigation will affect numerous other workingmen, nor have petitioners shown that the immediate question is a continuing one.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1949.

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